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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 466

HERMAN GREENBERG,

Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

APPELLEE'S STATEMENT OPPOSING JURISDICTION

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Defendant and Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellee

APPELLEE'S STATEMENT OPPOSING JURISDICTION

The People of the State of California, appellee, respectfully present the following matters making against the jurisdiction of this Honorable Court asserted by appellant.

Statement of the Case

By information, filed in the Superior Court of the State of California, appellant Herman Greenberg was accused of the crime of Grand Theft and of having suffered a prior conviction of a felony; he admitted the prior conviction, was tried by a jury, and found guilty of Grand Theft. He was sentenced to the State Prison for the term prescribed by law.

On March 27, 1946 the District Court of Appeals of the State of California, Second Appellate District, affirmed

the judgment of the Superior Court of Los Angeles County.

Thereafter the appellant filed a petition for a hearing in the Supreme Court of the State of California, the highest court of said state, and on April 25, 1946 said petition for a hearing was denied by the said Supreme Court. Thereafter, on the 21st day of May, 1946, the Honorable Walter Desmond, Presiding Judge of the aforesaid District Court of Appeal, signed an order allowing an appeal to the Supreme Court of the United States.

Constitutional Questions Presented

Appellant, in his petition for appeal and assignment of errors, raises the question of validity of Article I, Sec. 13 of the Constitution of the State of California, as amended in 1934, and the Penal Code sections based thereon. It is his contention that said constitutional and statutory provisions are repugnant to and violative of the Fourteenth Amendment to the Constitution of the United States. In considering the instant question, Article I, Sec. 13, and Article VI, Sec. 19, of the Constitution of the State of California, both as amended, need be considered together.

Article I, Sec. 13, of the Constitution of the State of California was amended in 1934 by including the following provision:

> "... but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him, may be commented upon by the court and by counsel, and may be considered by the Court or the jury."

Article VI, Sec. 19, as amended November 6, 1934, reads as follows:

> "... The Court may instruct the jury regarding the law applicable to the facts of the case, and

may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The Court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."

Based on the foregoing constitutional provisions, certain sections of the Penal Code of the State of California were amended and, so far as material here, the Code sections are those numbered 1093, 1127 and 1323. The material part of Section 1093 reads as follows:

"6. The Judge may then charge the jury, and must do so on any points of law pertinent to the issue, if requested by either party; and he may state the testimony, and may comment on the failure of the defendant to explain or deny by his testimony any evidence or facts in the case against him, whether the defendant testifies or not, and he may make such comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case and he may declare the law. If the charge be not given in writing, it must be taken down by the phonographic reporter."

The material part of Section 1127 reads as follows:

". . . In charging the jury, the Court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the Court. The Court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact

submitted to them and of the credibility of the witnesses. . . ."

Section 1323 reads as follows:

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

Grounds upon Which the Appellant's Contention Is Based

On pages 4 to 7 of appellant's Jurisdictional Statement he sets forth his grounds or reasons why the California Constitution and the Code sections based thereon violate the Fourteenth Amendment to the United States Constitution, and these grounds and reasons are in substance as follows:

1. That Article I, Sec. 13, of the Constitution of California as amended in 1934 and Sec. 1323 of the Penal Code permitting court and counsel to comment on and the jury to consider defendant's failure to explain or deny any evidence against him, permit an inference or presumption of guilt from defendant's silence, and said Constitutional and Code sections are violative of, and infringe the due process clause and the privileges and immunity clause of the Fourteenth Amendment to the United States Constitution.

2. That the above referred to California Constitutional and Code provisions coerce the defendant in a criminal case to take the witness stand and if he fails to do so, a confession of guilt is inferred by his silence.

3. The above referred to California Constitutional and Code provisions shift the burden of proof to a defendant

in a criminal case and arbitrarily make him guilty of crime by his silence.

4. There is no logical or rational connection between defendant's failure to explain or deny by his testimony any evidence in the case against him and the fact inferred or presumed that he is guilty.

Appellee's Answer to Appellant's Contentions

The appellant herein in the case of *People* v. *Herman Greenberg*, Criminal No. 3927, urged the same grounds on his appeal in the District Court of Appeals of the State of California, Second Appellate District, and a hearing in the Supreme Court of the State of California was denied on April 25, 1946. In the opinion of the District Court of Appeals, among other things, it stated:

> "Appellant did not take the stand at the trial. The prosecutor commented upon that fact in his arguments to the jury and the court gave an instruction upon it. As one of the grounds of the appeal it is argued that section 1323 of the Penal Code and Article I, section 13, of the State Constitution, as amended in 1934, which permit the court and counsel to comment upon the failure of a defendant to explain or deny by his testimony any evidence or facts in the case against him, and allow the same to be considered by the court or jury, are in violation of the 14th Amendment to the Constitution of the United States, in that such procedure deprives the defendant of due process of law. Since the briefs were filed, it has been decided that the Penal Code section and the 1934 amendment to the Constitution do not violate the due process clause of the 14th Amendment. The identical question and the same arguments were presented to the Supreme Court in *People* v. *Adamson*, 27 A. C. 495, and were decided adversely to the contentions of appellant."

In the above cited case of *People* v. *Adamson*, 27 A. C. 495, 165 Pac. 3, an order allowing appeal to the Supreme Court of the United States was signed on April 15, 1946 by the Honorable William O. Douglas, the Associate Justice of the Supreme Court of the United States. The case of *People* v. *Adamson, supra,* is an extended and well considered opinion on the questions here presented and decided contrary to the appellant's contentions. It was therein decided that there is nothing in Article I, Sec. 13 of the Constitution of the State of California, as amended in 1934, nor the Penal Code sections based thereon that in any manner violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. For the purpose of brevity it will not be necessary for us here to set forth all of the language and authorities cited by the Supreme Court of the State of California in the case of *People* v. *Adamson, supra;* however, we will set forth the following excerpts:

> ". . . Before the 1934 amendment, it was the rule in California that commenting on the defendant's failure to take the stand or advising the jury that it could draw inferences unfavorable to him on that account violated the privilege against self-incrimination. (People v. Tyler, 36 Cal. 522.) The 1934 amendment limited but did not abolish this privilege. A person still cannot be compelleed in any criminal case 'to be a witness against himself,' but the privilege no longer extends so far as to prevent comment upon or consideration of his failure to explain or deny evidence against him." (27 A. C. at p. 503.)
>
> "It is clear from the terms of the constitutional provision that the consideration and comment authorized relates, not to the defendant's failure to take the stand, but to 'his failure to explain or deny by his testimony any evidence or facts in the case against him' whether he testifies or not. The constitutional provision thus makes applicable to criminal cases in

which the defendant does not testify, the established rule that the failure to produce evidence that is within the power of a party to produce does not affect in some indefinite manner the ultimate issues raised by the pleadings, but relates specifically to the unproduced evidence in question by indicating that this evidence would be adverse." (27 A. C. at p. 504.)

"The failure of the accused to testify becomes significant because of the presence of evidence that he might 'explain or to deny by his testimony' (Art. I, Sec. 13, Cal. Const.), for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. (State v. Grebe, supra; Mooney v. Wavis, supra, 193; see Code Civ. Proc., Secs. 1963(5), (6), 2061(6), (7).) No such inference may be drawn, however, if it appears from the evidence that defendant has no knowledge of the facts with respect to which evidence has been admitted against him, for it is not within his 'power' (Code Civ. Proc., Sec. 2061(6)) to explain or deny such evidence. (Ibid. Sec. 1963(5); Parker v. State, 61 N. J. L. 308 (39 A. 651); Caminetti v. United States, 242 U. S. 470, 494, 495 (37 S. Ct. 192, 61 L. Ed. 442); Batch v. Archer, supra; R. v. Burdett, 4 B. & Ald. 122; see People v. Albertson, 23 Cal. 2d 550, 585 (145 P. 2d 7).)

"It was never intended, of course, that the 1934 constitutional amendment should relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by admissible evidence supporting each element of the crime. (Citations.) Nor can the defendant's silence be regarded as a confession." (27 A. C. at p. 506.)

"Defendant contends that the rational connection between a fact proved and the fact presumed required by the due process clause of the Fourteenth Amendment (People v. Scott, 24 Cal. 2d 774, 779 (151 P. 2d 517) and cases there cited; Tot v. United States, 319 U. S. 463, 467 (63 S. Ct. 1241, 87 L. Ed. 1519)) does not exist between the failure to deny or explain incriminating evidence and the inference of the credi-

bility and unfavorable tenor thereof that these provisions permit the jury to draw." (27 A. C. at p. 509.)

". . . The inference is rational if the proved fact is a warning signal according to the teachings of experience. (People v. Scott, 24 Cal. 2d 775, 780 (151 P. 2d 517); Morrison v. California, 291 U. S. 82, 90 (54 S. Ct. 281, 78 L. Ed. 664).) It is common experience that the failure to explain or deny adverse evidence that a defendant may reasonably be expected to explain or deny tends to show the credibility of such evidence and renders more probable the unfavorable tenor thereof. (Code Civ. Proc., Secs. 1963(5), 2061(6); State v. Grebe, supra; see 2 Wigmore, supra, 164 et seq.; 31 Mich. L. Rev. 226, 229.)" (27 A. C. at p. 510.)

In addition to the authorities cited in the *Adamson* case, *supra* (27 A. C. 495), we call attention to the case of *Palko* v. *Conn.*, 302 U. S. 319, 325, 82 L. Ed. 288, where the Supreme Court of the United States, among other things, stated:

". . . The right to trial by jury and the immunity from prosecution except as the result of an indictment, may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' (Cases cited.) Few would be so narow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of *the immunity from compulsory self-incrimination.* Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 S. Ct. 14, supra. *This too might be lost, and justice still be done.* Indeed, today as in the past there are students of our penal system who look upon immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. Brown v. Mississippi, 297 U. S. 278, 80 L. ed.

682, 56 S. Ct. 461, supra. *Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry.* The exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself." (Emphasis ours.)

The Supreme Court of California in *People* v. *Ottey*, 5 Cal. (2d) 714, 56 Pac. (2d) 193, in speaking of the Constitutional Amendment to Article VI, Sec. 19, with reference to the judge's power to make comments on the evidence and testimony and credibility of any witness as, in his opinion, necessary for the proper determination of the case, said at page 723:

". . . In the first place it is certain that a very distinct and important innovation in the long-standing rule in this state was brought about by the constitutional amendment. Its purpose was to abolish the prior limitations on the trial judge's participation in the trial of a case with respect to comment on the evidence and on the credibility of the witnesses. In other words, it was the intention to place in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases, instead of being in the position of a mere referee or automaton as to the ascertainment of the facts. To the seasoned practitioner in our state courts this so-called radical change has no doubt come with considerable of a shock. None the less the change has been made and it must be recognized as an endeavor to remedy an evil in the trial, especially of criminal cases, by jury. It is the duty of this court to accord to the amendment its full beneficial effect, uninfluenced by decisions in this state under the old law."

The fact that the new law and procedure of the State of California on the subject here presented is a departure

from the old law and procedure on the same subject does not involve a violation of the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.

Hayes v. *Missouri*, 120 U. S. 68, 30 L. Ed. 578;
Brown v. *New Jersey*, 175 U. S. 172, 175, 44 L. Ed. 119;
People v. *Hickman*, 204 Cal. 470, 268 Pac. 909, 270 Pac. 1117.

Appellant would have this Honorable Court review the decision of the Supreme Court of California also upon the ground that, states the appellant, "The prosecutor even went to the extent of requesting the defendant to arise in the courtroom." (Appellant's Statement of Jurisdiction on Appeal, p. 5, lines 23-25.) Such did not occur during argument to the jury. It occurred during direct examination of a witness for the prosecution when the appellant was requested by the court, at the instance of the prosecution, to arise for the purpose of being identified by the witness, and the appellant refused to arise. (Opinion of the District Court of Appeal, Appellant's Statement of Jurisdiction on Appeal, p. 7, line 18, p. 8, line 6.) It is well settled in California that the defendant in a criminal case may be required to arise before the jury for the purpose of being identified. (*People* v. *Clark*, 18 Cal. (2d) 449, 460-461, 116 Pac. (2d) 56, reviewing the authorities.)

It is evident from a consideration of the changes in the Constitution of the State of California, especially since the adoption of Article VI, Sec. 4½, and the above recent amendments to Article I, Sec. 13, and to Article VI, Sec. 19 of the California Constitution, that it was intended that a

defendant in a criminal case should be treated with fairness, but not with favor. By such constitutional and statutory provisions, the People of California have ordained that while justice is due the accused, justice is also due the accuser. Such concept of fairness was intended to require a defendant in a criminal case to explain or deny the evidence against him, when it is reasonably within his power to do so and such concept must not be strained until it is narrowed to a filament. Its purpose is to keep the balance true in the administration of justice to each party.

Conclusion

Appellee believes that appellant has failed to present to this Honorable Court a substantial federal question and, therefore, appellee moves that the appeal herein be dismissed.

Respectfully submitted,

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